

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY WALLER BAKER,

Defendant-Appellant.

UNPUBLISHED

January 29, 1999

No. 203708

Recorder's Court

LC No. 96-006259

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration of a victim under thirteen years of age). Defendant was sentenced to a term of twelve to twenty-five years' imprisonment. We affirm.

Defendant asserts that the trial court erred in admitting hearsay testimony in violation of MRE 803A, regarding the hearsay exception for a child's statement about a sexual act,¹ as the statement was not spontaneous and was testified to by more than one witness. Defendant failed to preserve this issue for appeal by not objecting to the admission of this testimony at the time of trial. This issue need not be addressed, therefore, unless failure to do so would result in manifest injustice. *People v Burgess*, 153 Mich App 715, 722-723; 396 NW2d 814 (1986). Review of the record reveals that the statement was spontaneous. The victim stated that he wished to speak about something but feared the witnesses would be angry with him. There was no evidence that the witnesses prompted a sexual conversation with the victim. Rather, the witnesses assured the victim that they would not be angry with him for providing them with information. Therefore, the statement was spontaneous.

MRE 803A also provides that "if the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." Defendant contends, without citation to authority, that only one witness may testify to the statement pursuant to MRE 803A. This issue has been abandoned as defendant failed to object below and does not support his argument on appeal by citation to legal authority. *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994).

In any event, the victim's first corroborative statement was made to a group of people. Three members of the group testified at trial regarding the contents of this first corroborative statement. Therefore, there was no violation of this rule. Although defendant asserts that the drafters of the rule did not intend to permit the testimony of more than one witness, our review of the rule reveals no such intent. See 3 Robinson, Longhofer & Ankers, Michigan Court Rules Practice Evidence, pp 200-205. Defendant's contention is accordingly without merit.²

Defendant also contends that the trial court erred in failing to ascertain whether defendant knowingly and intelligently waived his right to testify. We disagree. The trial court has no duty to obtain a knowing and intelligent waiver on the record. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

Defendant also asserts that trial counsel was ineffective by failing to investigate, failing to present an alibi defense, failing to object to the admission of hearsay testimony and failing to subpoena the victim's medical records. We disagree. Where defendant fails to move in the trial court for a *Ginther*³ hearing, this Court reviews the record for apparent error that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and prejudiced defendant, i.e., a reasonable probability exists that but for counsel's error, the result would have been different. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW 2d 557 (1994); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1988). Claims of ineffective assistance of counsel based on defense counsel's failure to object or bring motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Defendant cannot enlarge the record on appeal by filing an *ex parte* affidavit for the first time on appeal. *People v Brown*, 119 Mich App 656, 665; 326 NW2d 834 (1982).

The only alleged errors visible on the record are counsel's failure to object to three witnesses' corroborative statements that allegedly constituted hearsay testimony and counsel's failure to object to the mother's testimony that the victim told a doctor, the police, the prosecutor, and a district court judge about the sexual assault.⁴ The admission of the first statement corroborating the victim's description of the sexual act, as reiterated by three witnesses, was proper as there is no limiting language in MRE 803A that precludes the testimony from more than one individual where all the individuals heard the spontaneous statement at the same time.

We also find no prejudice to defendant regarding counsel's failure to object to testimony that the victim told a doctor, police, the prosecutor and a district court judge about the assault. The testimony first came out on direct examination of the victim's mother, and defense counsel expanded upon the details of the mother's conversation with the police on cross-examination. Defendant argued in his closing that the victim originally told a lie and was locked into the story after he gave the information to family members. Defendant submitted that the victim continued to perpetuate the lie and pointed out the inconsistencies in the victim's testimony. Because defense counsel chose to use this testimony in an attempt to bolster defendant's case, the fact that this strategy was unsuccessful will not serve as grounds for reversal. A defendant may not harbor

error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Accordingly, defendant failed to meet his burden of demonstrating ineffective assistance of counsel. *Plummer, supra* at 308.

Finally, defendant contends that prosecutorial misconduct denied him a fair trial. We disagree. In reviewing claims of prosecutorial misconduct, this Court must examine the remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Our review of the prosecutor's comments in context reveals that the prosecutor was merely responding to the argument of defense counsel. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). As the prosecutor's comment was in response to defendant's closing argument, there was no misconduct.

We affirm.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey

¹ MRE 803A states as follows:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, on the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

² Defendant also argues that the victim's mother's hearsay testimony unfairly bolstered the victim's credibility and was prejudicial to him. Although the victim's mother testified regarding the contents of the statements her son made to her some time after he told his relatives about the assault, this testimony came into evidence during cross-examination. Likewise, the mother admitted on cross-examination that she told the police what her son told her, which she recognized was hearsay, but it was defense counsel who recounted the specific facts contained in her police statement. Where a defendant injects information into the proceedings by his own action, appellate review is waived. See *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992). Accordingly, the trial court did not abuse its discretion in admitting the victim's mother's hearsay testimony where defendant elicited the specifics of the testimony on cross-examination.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

⁴ Several of defendant's alleged ineffective assistance claims are not supported by or visible in the record. For example, because defendant's affidavit makes a blank assertion that he worked evenings rather than specifying the specific hours he worked and where he worked on the date in question, it is questionable on the record whether defendant had an alibi defense despite the victim's testimony that the assault took place at "nighttime," which he later described at the early morning. Affidavits devoid of detail and containing merely conclusory allegations are insufficient. See, e.g., *Quinto v Cross and Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Further, because defendant failed to obtain affidavits from the individuals he claimed his counsel should have called as witnesses, including one who would allegedly testify that the victim had made other allegations of sexual abuse, we have no record evidence that these individuals would corroborate defendant's blanket assertion of prejudicial error for his counsel's failure to investigate. See *People v Caballero*, 184 Mich 636, 640-642; 459 NW2d 80 (1990). Finally, given that the prosecutor admitted that no medical evidence of sexual assault existed, it is unclear why defendant contends that his counsel should have subpoenaed the victim's medical records. No prejudice would result from such a failure. See *Plummer, supra*. at 307-308.